IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

CRL.A.No. 183 of 1998(A)

SC.87/1996 of ADDL. SESSIONS COURT, ALAPPUZHA

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APPELLANT/ACCUSED:

MUHAMMED HUSAIN @ KUNJUMON,
SON OF MUHAMMED HUSAINA MANZILIL,
MANNANCHERRY PANCHAYAT, WARD NO.11,
MANNANCHERRY VILLAGE.

BY ADVS. SRI.B.RAMAN PILLAI
SRI.GEORGE PHILIP
SRI.R.ANIL
SRI.RAJU RADHAKRISHNAN
SRI.ANIL K.MOHAMMED
SRI.DELVIN JACOB MATHEWS

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
DEPUTY SUPERINENDENT OF POLICE, ALAPUZHA.

BY IRECTOR GENERAL OF PROSECTIONS SRI. P.G.THAMPI
PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 183 OF 1998

Dated this the 10th day of October, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.87 of 1996 on the file of the Additional Sessions Court, Alappuzha. The appellant faced trial for the offences punishable under Sections 498A and 306 I.P.C.

2. The prosecution case in brief is as follows: The appellant - accused married one Shahana, the deceased in this case, on 16.2.1992 in accordance with the customs prevalent in their community. After marriage, they resided at a place called Karuvatta for sometime and thereafter shifted their residence to the house of the uncle of the accused. After sometime, the accused sold the gold ornaments given to deceased Shahana at the time of marriage and purchased 23 cents of property in his name at Mannancherry. Thereafter, the appellant - accused compelled and harassed deceased Shahana to get more share from her family whereupon an amount of Rs.15,000/- was given to her out of the family

share and an amount of Rs.25,000/- was given on selling the property belonging to her father and one half of the 23 cents of landed property was transferred in her name during 1993. Thereafter, the accused used to harass and torture deceased Shahana physically and mentally to transfer her share of the property in his name and on 27.2.1995, the appellant - accused assaulted her and thereby abetted her to commit suicide. On 28.2.1995 deceased Shahana went to the house of her uncle, PW.4 , along with her child and when her brother PW.1 was informed about this, he took deceased Shahana and her child to his house and seeing the injuries on her body, took her to the Medical College Hospital Alappuzha. She returned home on the same day and as she was mentally depressed due to the torture, she consumed poison on 1.3.1995 at 4.p.m. and as she started vomiting on 2.3.1995, she was again taken to the Medical College Hospital, Alappuzha and while undergoing treatment she died at 9.45 p.m. on 4.3.1995. With the above charge, the appellant was prosecuted. To prove the case against the appellant, the prosecution examined PWs.1 to 24 and produced Exts.P1 to P25 as well as MOs.I to VII(e). On the side of the defence, DWs.1 and 2 were examined and Exts.D1 to D3(c) were produced. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. The appellant - accused denied the prosecution charge and stated that he had never harassed deceased

Shahana. He further stated that deceased Shahana had field a complaint against her brother, PW.1 before Mohamma Police Station and that there was a wordy altercation between himself and PW1 at the police station. He further stated that he came to know about the death of his wife through his friend Saddiq. The accused also stated that on 15.3.1995, he went to Alappuzha North Police Station and the Circle Inspector of Police arrested him and detained him at the police station for 12-15 days. After considering the entire evidence, the trial court found the appellant - accused guilty under Sections 306 and 498A I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for seven years under Section 306 I.P.C. and rigorous imprisonment for three years under Section 498A I.P.C. The sentences were ordered to run concurrently. The accused was also given the benefit under Section 428 Cr.P.C. The above conviction ans sentences are challenged in this appeal.

3. Heard the learned counsel appearing for the appellant as well as Sri. P.G. Thampi, the learned Director General of Prosecution.

4. The main contention raised by the learned counsel appearing for the appellant is that the trial court committed serious error in finding that Shahana committed suicide and that the appellant had abetted her to

commit suicide. Before proceeding further, it is necessary to find out whether the finding of the trial court is based on evidence. In paragraph 41 of the impugned judgment, the trial court observed as follows:

> "There is no evidence to prove when she has taken poison and from where. The Investigating Officer was not able to produce acceptable evidence as to the time and place of consumption of poison. But the charge is that the deceased consumed poison after 4 p.m. on 1.3.95 and before 2.3.95 morning because she began to vomit on 2.3.95 in the morning. Failure to prove the exact time and place of consumption of poison is not at all fatal to prosecution in this case. The contention of the defence is that if she had consumed zinc phosphide the fatal period is 24 hours that she should have died earlier. But this contention is not acceptable because PW.22 the doctor has stated categorically that if the quantity of the poison consumed is small the person will survive beyond 24 hours. The argument advanced by the defence counsel is based on medical jurisprudence that if the deceased consumed zinc phosphide the death would occur within 24 hours. But if the quantity of poison is lesser there is the possibility of extension of time of death as stated by PW.22."

A reading of the above finding of the trial court would show that there was no evidence before the trial court to conclude that deceased Shahana committed suicide. If that be so, the trial court committed serious error in finding that the accused had abetted her to commit suicide and thereby

committed offence punishable under Section 306 I.P.C. The prosecution case is based on the evidence of PWs.1 to 4. These witnesses had given evidence regarding the marriage of the accused and deceased Shahana and the subsequent ill treatment suffered by deceased Shahana at the hands of the accused.

5. Now, coming to the medical evidence, PW.12 was the doctor who treated Shahana on 28.2.1995. He issued Ext.P6 wound certificate in which the following injuries are noted:

1) Multiple tiny abrasion, contusion on right forearm, left forearm,left side of neck covered with blood clot which is dried.

2) Contusion left shoulder region 3 x 2 cms.

This witness stated that he was in the Casualty attached to the Medical Colleges Hospital and that Casualty being the busy section of the hospital, he was not able to go deep into the other injuries found on the body of deceased Shahana. He further stated that the victim was conscious and oriented. PW.12 also stated that the allegation was "പത്തലും ചൂരലും വച്ച് അടിക്കയും കൈകൊണ്ട് ഇടിയ്കയ ും ചെയ്തതിൽ വച്ച് " He further stated that there was no complaint regarding consumption of poison or any case of

vomiting. PW.13 was working as Lecturer in Medicine at the Medical College Hospital, Alappuzha during the relevant time. This witness was examined to prove that deceased Shahana was admitted at the Medical College Hospital at about 8.30 a.m. on 2.3.1995 with the alleged history of consumption of rat poison three days prior to her admission in the hospital. This witness stated that the patient complained of abdominal pain, vomiting and giddiness. He further stated that the patient was de-hydrated and that there was no other symptom of poisoning. Ext.P8 is the O.P. ticket issued by him. When cross-examined, this witness stated that there was no clinical signs of poisoning and that he was not told about her previous treatment at the hospital. PW.22 was the Assistant Professor, Medicine, Medical College Hospital, Alappuzha during 1995. He stated that a patient by name Shahana was admitted in the hospital on 2.3.1995 alleging consumption of unknown poison. This witness stated that the patient was fully conscious, oriented, her lungs were clear and B.P. was 100/60 mm. He also stated that her heart and nervous system were normal and that he noted tenderness in the abdomen. He further stated that he elicited the history that poison was consumed by deceased Shahana on 26.2.1996. This witness further stated that the fatal period in the case of rat poison is 24 hours. When it was suggested to this witness that the person would not have survived if poison was taken on 26.2.1995, he

stated that if the quantity consumed was small, the patient would survive even after 24 hours. He also stated that the fatal period may vary according to the type of poison and the quantity of consumption. He further stated that he had seen the patient six times during the treatment on 2.3.1995, that the patient was suffering from vomiting, giddiness and de-hydration and that she died at 9.45 p.m. on 4.3.1995. In cross-examination, this witness had stated that when he saw the patient at 11.45 a.m. on 4.3.1995, she was restless and irritable. He also stated that the date of consumption of poison was recorded as per the statement given by the patient.

6. The Associate Professor and Deputy Police Surgeon attached to the Medical Colleges Hospital, Alappuzha who conducted postmortem on the body of deceased Shahana was examined as PW.17. He issued Ext.P12 postmortem certificate. He stated that he noted the following antemortem injuries on the body of deceased Shahana:

1. Contusion 1.5 x 1 cm over the outer aspect right arm 3 cm below tip of shoulder.

2. Contusion 8 x 3.5 cms involving the tip of left shoulder and outer aspect of left arm.

3. Contusion 8 x 4.5 cms on the front of right

forearm, 3 cms below elbow. All the above contusions were brownish black in colour.

4. Abrasion 1.5 x 1 cm over left side of neck 1 cm below the ear.

5. Abrasion 2.5 x .5 cms over the back of right elbow.

6. Abrasion 0.7 x 0.5 cm. over the inner aspect of right forearm 2.5 cms aboves the wrist.

7. Abrasion 2.5 x 1 cms over the inner aspect of right forearm 2 cm above injury number (5).

8. Abrasion 1.5 x 0.5 cms over the back of right thump 1 cm below its root.

9. Abrasion 1 x 0.5 cm over the back of right hand 2 cms above root of thump.

10. Abrasion 0.5 x 0.5 cms on the outer aspect of left forearm 1 cm above the wrist.

11. Abrasion 0.5 x 0.5 cms over the back of root of left palm.

12. Abrasion 2 x 1.5 cms over the front of left leg 4 cms below the knee. All he above abrasions were covered with black dry scab.

This witness further stated that the stomach contained 20 ml. of brownish fluid with partly digested soft meat particles and blackish powdery materials sticking to mucosa which was pale and yellowish with a strong unusual smell. He also stated that as per Ext.P13 chemical analysis report,

the patient died of zinc phosphide poison as zinc phosphide was detected in the stomach contents. According to this witness, normal fatal period of zinc phosphide poisoning is one day, but it can go upto three days and that death occurs within three days. He further stated that zinc phosphide causes vomiting, abdominal pain and restlessness. This witness also stated that the patient might have consumed the poison three days prior to her death. When cross-examined, this witness stated that he cannot say exactly when the deceased took the poison. He was definite that all the antemortem injuries were visible and measurable. This witness also stated that clinically it was possible to detect poison.

7. From the above medical evidence and the evidence of PWs.1 to 4, it is not possible to say whether deceased Shahana consumed poison voluntarily or whether poison was administered to her by the appellant - accused. In this context, Ext.P16 first information statement recorded by PW.20 is relevant. In Ext.P16 it is stated as follows: അഞ്ചെട്ടു ദിവസം മുമ്പ് എനിക്ക് പെട്ടെന്നു വയറു വേദന ഉണ്ടായി. ഭർത്താവ് ഏതോ മരുന്ന് എനിക്ക് രാത്രിയിൽ തന്നു. അതിനു വലിയ ദുസ്വാദും മറ്റുമായിരുന്നു. എന്താണ് മരുന്നെന്ന് ചോദിച്ചതിൽ ഭർത്താവ് ഒന്നും പറഞ്ഞില്ല. വസ്തു പണയപ്പെടുത്തി ബാങ്കിൽ നിന്നും ലോൺ എടുക്കണമെന്ന് പറഞ്ഞതിന് ഞാൻ സമ്മതിക്കാത്തതിനാൽ മൂന്നുനാലു ദിവസം മുൻപ് ഭർത്താവ് ഒരു പത്തൽ വടിയെടുത്ത് എന്നെ ശരീരത്ത് പല ഭാഗത്ത് അടിച്ചു ദേഹോപദ്രവം ഏൽപിച്ചു. ദേഹോപദ്രവം കൂടിയപ്പോൾ എന്റെ കരച്ചിൽ കേട്ട് ആളുകൾ

ഓടിക്കൂടിയപ്പോൾ ഭർത്താവ് എല്ലാവര ും പോകട്ടെ നിന്നെ ശരിയാക്ക ുന്നുണ്ട് എന്ന ു പറഞ്ഞ് വീട്ടിൽനിന്ന ും പോയി. From the above statement and the evidence of PWs.1 to 4 it can be seen that some medicine was administered to deceased Shahana by the appellant - accused on 26.2.1995. The evidence of PW.20 who recorded the above statement would show that he went to the hospital on getting information regarding the incident. PW.21, the Sub Inspector of Police, North Police Station, Alappuzha stated that he registered Crime No.95 of 1995 and Ext.P17 First Information Report was sent to the court. PW.23, the Circle Inspector of Police stated before the court that he took up investigation of the case on 4.3.1995, questioned the witnesses and as per Ext.P19 search list, searched the house of the appellant - accused from where he seized MOs.1 to MO.VII(e). He further stated that he arrested the accused on 24.3.1995 at 7.40 p.m. He also stated that his investigation did not reveal the time and place of consumption of poison. This witness also stated that his investigation did not reveal whether the deceased had consumed poison voluntarily or whether poison was administered to her by somebody else. PW.24 was the Deputy Superintendent of Police who took over the investigation of the case on 8.3.1995. The evidence of this witness also would not show whether the deceased Shahana had consumed poison voluntarily or whether poison was administered to her by somebody else.

8. On analyzing the evidence of these witnesses, the trial court had not come to a definite conclusion whether the death of Shahana was suicide of homicide. Unless and until this aspect is proved, the findings entered by the trial court are not sustainable. In the above circumstances, this Court is left with two options, either to order reinvestigation of the case or order retrial. In a case of this nature, the materials placed before this Court has to be looked into. It is not possible to come to a definite conclusion from the medical evidence adduced by the prosecution whether deceased Shahana consumed poison voluntarily or otherwise. Hence, it is not possible to hold whether death was due to suicide or homicide. Both PWs.12 and 13, the doctors who examined and treated Shahana, were definite that the fatal period in a case of zinc phosphide poisoning is one day. Even in Ext.P16 first information statement, the case of the deceased was that some medicine was given to her by her husband on 27.2.1995. At the same time, in the statement recorded by PW.12, it was stated that consumption of medicine was on 26.2.1995. In the above circumstances, the evidence of PWs.1 to 4 is not enough to prove whether death was due to suicide or homicide. If Ext.P16 is taken as a dying declaration of deceased Shahana,the investigation conducted by the investigating agency is also shabby as it does not prove the exact incident.

9. In the above circumstances, as per the principles laid down by the Apex Court in the decision reported in **Zahira Habibulla H. Sheikh v. State of Gujarat, 2004 S.C.C. (Cri)** 999, this Court is of the view that the finding entered by the trial court and the conviction and sentence ordered against the appellant - accused is shocking to the conscience of justice and this Court is compelled to take a view under the appellate power of this Court contemplated under Section 386 Cr.P.C. to remand the matter to the trial court for retrial. In the decision referred to above, the Apex Court had considered the power of the appellate court to order a retrial under Section 386 Cr.P.C. or direct additional evidence to be taken under Section 391 Cr.P.C. Considering the purpose of a judicial trial, the Apex Court, in paragraph 38 of the above judgment, held as follows:

> " A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and

> punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny."

10. Considering all these aspects and finding that the trial court had not conducted a proper trial so as to serve the purpose of a trial, this Court is of the view that the impugned judgment is liable to be set aside. Accordingly, the impugned judgment is set aside and the matter is remanded to the trial court for retrial. It is made clear that if the State and the accused desire to adduce any further evidence or cross-examine any of the witnesses already examined, that shall be allowed by the trial court. As the matter is of the year 1995, the trial court is directed to dispose of the matter within a time frame.

The Crl. Appeal is allowed by way of remand. The interim order passed by this Court on 11.3.1998 in Crl. M.P.No.1051 of 1998 shall continue till a final decision is taken by the trial court.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.183/1998

JUDGMENT

10th OCTOBER, 2007